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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY WILLIAMS,

Petitioner,

vs.

JAMES PASMA,

Respondent.

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ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF THE STATE OF MONTANA

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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## 1. QUESTION PRESENTED

This case presents the questions of:

1. Whether petitioner, William, was, at the time of the claimed libel, an "all purpose" public figure within the meaning of the First Amendment to the U.S. Constitution?

2. Whether the First Amendment's requirement of "actual malice" has application where the libel defendant is not a member of the organized media and the claimed libel had no logical connection to a "public controversy" concerning petitioner Williams?

3. Whether there is sufficient evidence of "actual malice" to present a triable jury issue?

## 2. TABLE OF CONTENTS


| | Page |
|---|---|
| 1. Questions Presented | 1 |
| 2. Table of Contents | 2 |
| 3. Table of Authorities | 3 |
| 4. Opinions Below | 4 |
| 5. Jurisdiction | 4 |
| 6. Constitutional Provision Involved | 4 |
| 7. Statement of the Case | 5 |
| 8. Reasons for Granting This Writ | 15 |
| 9. Conclusion | 23 |
| 10 Appendix | |
| Opinion, Montana Supreme Court | A-1 |
| Opinion, 13th Judicial District, District Court | A-24 |

## 3. TABLE OF AUTHORITIES


| Cases | Pages |
|---|---|
| Church of Scientology of Calif vs. Siegelman, 475 F Supp 950 (SD NY 1979) | 20 |
| Garrison vs. Louisiana, 379 US 64, 13 L Ed2d 125, 85 S Ct 209 | 18, 19 |
| Gertz vs. Robert Welch, Inc., 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 | 15, 16 |
| Hutchinson vs. Proxmire, 443 US 111, 99 S Ct 2675, 61 L Ed 2d 411 | 19, 20 |
| Ocala Star-Banner Co vs. Damron, 401 US 295, 28 L Ed 2d 57, 97 S Ct 628 | 18 |
| Time, Inc. vs. Firestone, 424 US 448, 96 S Ct 958, 47 L Ed 2d 154 | 19 |
| Waldbaum vs. Fairchild Pub. Inc, 627 F2d 1287 (DC Cir)(1980) | 16 |
| Williams vs. Pasma, (Mont) 656 P2d 212 | 15-17,22 |
| Wolston vs. Reader's Digest Assoc., Inc. 443 US 157, 99 S Ct 2701, 61 L Ed 2d 450 | 17 |

## 4. OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is reported at 656 P.2d 212, printed in the Appendix hereto, infra., page A-1. The lower state district court opinion follows.

## 5. JURISDICTION

The opinion of the Supreme Court of the State of Montana sought to be reviewed was entered on December 29, 1982. The jurisdiction of this court is invoked under the Judicial Code, 28 United States Code, Section 1257(3).

## 6. CONSTITUTIONAL PROVISION INVOLVED

The case involves the following Amendment to the United States Constitution:

### Amendment 1

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

## 7. STATEMENT OF THE CASE

A. Facts material to federal questions presented. Petitioner Williams is the defamation plaintiff who sued respondent Pasma.

1. The Defamation.

In 1979, the Great Falls Tribune, a Montana paper distributed throughout Montana, carried a story about comments by the State Republican Executive Secretary concerning a state elective office, its Democratic incumbent, and a report that another person was securing the nomination to the Democratic primary to that office. The news story made no reference to Williams nor to any activity to which he was connected.

Two days later, Pasma wrote and was responsible for the publication and distribution of a press release, which was printed by the Tribune on October 27, 1979, which publication was the basis of the libel suit, and is set out in the Appendix at Page A-

In an aside, the Pasma press release

falsely stated that Williams - - who had no connection directly or indirectly to the controversy involved in the prior story or the Pasma release - - had "been under Federal indictment for political and financial shenanigans . . . " . Williams has never been under indictment, federally or otherwise, for any matter.

2. The defamation plaintiff Williams. Prior to the claimed libel, Williams published an investment advisory service and traded in regulated commodities and stocks and was a licensed commodity advisor and registered investment advisor. He was the author of three books on stocks and commodities, there being no evidence that any one in Montana had ever seen his books. In 1975 and 1976 he was the topic of an article published in Forbes Magazine and The Wall Street Journal.

In 1978 he was the Republican nominee for the U.S. Senate for Montana, losing the general election in the fall of 1978.

After his unsuccessful candidacy for the

U.S. Senate and up to the time of the libel, Larry Williams:

-- served in no official or unofficial capacity for the Republican Party. In the summer of 1979, he attended a Republican convention, but not as a delegate, and gave a speech for a candidate for State Chairman of the Republican Party. There is no evidence the speech was in the media.

-- gave no other speeches in Montana for or against candidates for political office, and gave a speech in Los Angeles to an Economic Conference. There is no evidence the speech was reported in the media.

-- was one of the leaders in Montana promoting the Republican Presidential candidacy of former Texas governor, but at the time of the libel, Williams had just been selected to be on the State Committee and had not undertaken any duties or activities in regard to Connally. Other than the announcement of his appointment to the Committee, there is no evidence of public activities nor that any

segment of the public was aware of the appointment.

-- was a member of the National Taxpayers Union, a non-partisan group of Republicans and Democrats that are not politically active but which disseminate information and attempt to influence policy. The N.T.U. is concerned with the cost and growth of government. The primary issue of concern was a legislative resolution for a constitutional amendment to balance the budget, on which Williams worked at the 1979 Legislature. During the Legislature, Williams made a public statement representing the N.T.U. in testimony before a Legislative Committee. On September 4, 1979, he made a public statement on behalf of the N.T.U. While coordinating that drive, the drive had few Montana members, there were no meetings, and no newsletters, and a small number of press releases - up to three - during the Legislative session were issued by Williams on the topic of a "balanced budget." There is no evidence that the media carried any of these releases

nor that any controversy arose as to the issue.

3. The defamation defendant Pasma. At the time of publication, Pasma was not a publisher or broadcaster or employed as such in any publishing or broadcasting media. There is no claim that he was a member of the organized media or was connected with any newspaper, radio or television outlet, nor that he was in any way a professional news disseminator.

His sole source of income was as a professional artist and he was a Democratic National Committeeman.

4. The circumstances surrounding the Defamation.

a) At and Before.

The defamatory publication makes no reference to the source of Pasma's false statement about Larry Williams. The only reference the false publication makes about Larry Williams' potential public status is his connection to the Connally campaign and his prior U.S. Senate candidacy.

Prior to his creation of the release,

Pasma did not check with any individual or consult any document, book, or record concerning the truth or falsity of the statement. No source of information is referred to by Pasma in the articles appearing in the press soon thereafter.

After suit was filed and Pasma's deposition taken does he claim that he was using his recollection of an article that appeared in the Billings Gazette, a Billings, Montana Newspaper, an article which he claims he didn't have before him when he wrote the press release.

Pasma did not check with the writer of the Gazette article or anyone else as to its accuracy. In any event, it does not say that Larry Williams was under indictment, Federally or otherwise, for any crime.

There is no suggestion or evidence that Williams, after his unsuccessful senate race and up to the defamation was a candidate for anything.

Pasma had read an article in Forbes Magazine (from 1975) and various press articles

about Larry Williams and the impression Pasma received from each of them was that Larry Williams "was an unsuitable candidate for public office." Pasma's defamation of Williams was to hinder any subsequent try for public office that Larry Williams might try.

b) After.

On Monday, October 29, 1979, Williams called Pasma by phone, two days after the libelous statement appeared in the Great Falls Tribune. Williams told Pasma that he, Williams, had not been under indictment at any time for anything, including political and financial shenanigans. Williams asked Pasma if he, Pasma, would "simply make a retraction of the statement." Williams wanted Pasma to say that he, Williams, had not been under Federal indictment.

Pasma told Williams over the phone in the same conversation that he, Pasma, would not make a retraction unless Williams could show to Pasma that he, Williams, had not been under Federal indictment.

Then Williams reiterated that he had never been under indictment and offered to correct any information Pasma might have had. No such information was forthcoming from Pasma.

Pasma, in the telephone conversation, then told Williams "to go to hell."

Williams thereafter, in a telephone interview with the Great Falls Tribune, printed on Tuesday, October 30, 1979, publicly demanded a formal retraction.

In a news interview, Pasma declined to issue a formal retraction but admitted in a telephone interview that his use of the words "Federal indictment' in a press release 'apparently was a poor one.'

Pasma, in his telephone conversation with Williams, said to Williams that he, Pasma, had no intention of withdrawing his statement.

And Pasma had stated in the Tribune interview printed October 30, 1979 that he was willing to believe Williams, but only until any third party told Him differently.

Williams' attempts to publicly set the record straight could not keep up with Pasma's

republication of the libel. As Pasma was approached by people who had seen the press publication of the libel and the article of Williams' seeking of a retraction and setting the record straight on October 30, 1979: "They simply asked me was the statement I made about him true, and I said to the best of my knowledge, yes." There were about 20 different people to whom he published the libel again.

Even after suit was filed by Williams to clear his name, Pasma continued to republish outside of any court pleadings. In an interview with news reporter Tim Linton of KTVQ in Billings, Pasma indicated that the statement was true and that he stood by it. Pasma also republished with a reporter of radio station KOJM of Havre, Montana, which broadcast a story on the Pasma charges.

Even as part of the news reports of the filing of the libel suit, Pasma was still issuing news releases on the topic and said that if his position on the matter didn't satisfy Williams "then he can go straight to hell."

B. Raising of the Federal question. The Federal question was raised by Pasma in a motion to dismiss before the District Court of the Thirteenth Judicial District, State of Montana, in the following manner:

> "1. The plaintiff is a public figure and therefore may not maintain an action for libel unless he can show clearly and convincingly that the said statements were made with actual malice; and
>
> "2. The said plaintiff has wholly failed to allege that the communication was made with actual malice, all as required by the laws and constitutions of the State of Montana and the United States of America." Motion to Dismiss of Pasma, Jan. 17, 1980.

The District Court's memorandum order, set out in the Appendix, clearly rested its decision on the public figure/actual malice considerations of the First Amendment.

By way of briefs to the Montana Supreme Court and oral argument, both parties raised and argued the First Amendment of the U. S. Constitution vis-a-vis each of the issues raised in this petition. The Montana Supreme Court in its opinion, Appendix, infra. page A-1, specifically rested its decision on the issues here raised on First Amendment considerations

only.

8. REASONS FOR GRANTING THIS WRIT

As to each of the three issues involved, there exist special and important reasons, which are not academic or abstract, for the granting of this Writ. The settlement of the principles involved are important to the public and the Federal questions are real and substantial.

A. Whether petitioner was an "all-purpose" public figure. The Montana Supreme Court held that Williams was a public personality for all aspects of his life, under Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 in that he had general fame or notoriety in Montana, and in Montana had exhibited persuasive involvement in the affairs of society. Williams v. Pasma, 656 P.2d 212, 215-216.

In so holding, the Montana Supreme Court decided an important question of Federal law in a way which has not been, but should be settled by this court, to-wit: 1) whether the

"in the community" language of Gertz, supra. refers to a state of national standard?; 2) whether the facts before the court are sufficient to find any such general fame or persuasive involvement regardless of the "community" involved?

It is submitted the Montana Supreme Court made a grave factual error in concluding that prior to the claimed libel Williams "served as Chairman for the Montana Republican Party." Williams v. Pasma, op.cit. at p. 216. No such contention was made by the opposing party and it is simply not correct. Prior to the claimed libel, Williams held no party office.

Regardless, counsel for petitioner is unaware of any court ruling holding one an all-purpose public figure on such limited facts. The public-involvement facts of Williams clearly fall outside the requirements of Waldbaum v. Fairchild Publications, Inc, 625 F.2d 1287 (1980 D.C. Cir.) requiring one to be a "celebrity" whose name is a "household word" whose ideas and actions the public in fact follows with great interest." At page

1292.

An added question is raised as to Williams former U.S. Senate candidacy and whether, from the passage of time, his public figure status in connection with that campaign had attenuated, a question explicitly reserved by this court in Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166, N. 7, 99 S.Ct. 2701, 2707, N. 7, 61 L.Ed.2d 450 (1979). To counsel for petitioner's knowledge, neither this court nor any other court has extended the protection of the First Amendment to cases solely involving former candidates for public office not candidates or public officials at the time of the claimed libel, where, as here, where the claimed libel was unrelated to the conduct of the previous campaign.

Additionally, the defamatory release only refers to Williams' public status as a previous U.S. Senate candidate and his appointment as one of two people to head a "John Connally for President" Committee in Montana. Williams v. Pasma, op. cit., at P. 213. It

is submitted that it is an open question before this court whether public figure characteristics not referenced in the libelous release can be considered. CF. Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 28 L.Ed.2d 57, 91 S.Ct. 628, at Note 4.

B. Whether the "actual malice" standard has application in a non-media defendant case where the claimed libel had no logical connection to a "public controversy" concerning Williams?

It is submitted that the Montana Supreme Court decided an important question of Federal law in a way which has not been, but should be, settled by this court, to-wit: Do the First Amendment requirements of actual malice apply to situations: a) involving a non-media defendant; b) and a purely-private libel, e.g. a libel unrelated to a public controversy or public affairs.

This court has expressly reserved the question of "purely private libels, totally unrelated to public affairs." Garrison v.

Louisiana, 379 U.S. 64, 13 L.Ed.2d 125, 131 at Note 8, 85 S.Ct. 209. With the replacement of "general or public interest" with "public controversy", Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 965, 47 L.Ed.2d 154, it is submitted the question is undecided and should be by this court.

Additionally, this court has reserved the question of whether the First Amendment restrictions apply to non-media defendants. Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 at N. 16, page 430.

Here, the claimed libel had no logical connection to any public status attribute of Williams or any public controversy in the air at the time.

C. Whether there was sufficient evidence of "actual malice" to present a triable jury issue?

It is submitted that the Montana Supreme Court decided an important question of Federal law which has not been decided, but should be, by this court and decided a question in conflict

with the applicable decisions of this court when it held, as a matter of law, that there was insufficient evidence of "actual malice" such that a jury could not reasonably have found for Williams.

This court has suggested that it disapproves of an inclination to grant summary judgment when the defendant's state of mind is called into question. Hutchinson v. Proxmire, op.cit., 61 L.Ed.2d 411, at P. 120, Note 9. This position has since been followed by the courts. See: Church of Scientology of Calif. v. Siegelman, 475 F.Supp. 950 (SD Ny 1979) at P. 955.

Petitioner relies upon the following facts or inferences of facts, which, when combined with each other, are sufficient to prohibit a finding of a lack of actual malice as a matter of law, especially with the evidence being viewed favorably to Williams for purposes of such a determination:

1. Failure to investigate under circumstances of a lack of "hot news", including

failure to contact Williams prior to publication;

2. Evidence of ill-will towards Williams by Pasma;

3. Lack of necessity of Williams' name even being mentioned, plus lack of any logical connection between Williams and the controversy at hand;

4. Reliance, if at all, on a published report with no knowledge as to the reliability of the source, the published report not concluding what the libel defendant did;

5. Failure to retract;

6. Republication, multiple, after the libel plaintiff advised him that the statement was false, and the defamation defendant stated he would believe that until someone told him differently;

7. Substantial danger to reputation apparent from nature of claimed libel;

Such a combination of items has not, to counsel's knowledge, been treated by this court;

Additionally, the only evidence cited by

the Montana Supreme Court in support of the proposition that there was no "actual malice" is the libel defendant's unsworn statement appearing in a newspaper that: "At the time I made the statement that Mr. Williams had been Federally indicted . . . I sincerely believed it, . . . taling to Mr. Williams by phone he assured me that this was incorrect, and as I said in a previous news release, I believe him." Williams v. Pasma, op.cit., at P. 216.

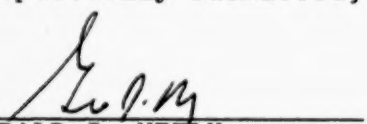
The Montana Supreme Court failed to point out that this statement was made after the libel suit was filed and is contradicted by all facts of record in the case, even the news article in which it appeared. The news article goes on to say: "'If Mr. Williams says he wasn't indicted, then I have no choice but to believe him unless someone informs me otherwise,' he [Pasma] said in October. In a later press release, Pasma said if this statement didn't satisfy Williams, 'then he can go to hell.'".

Pasma's out-of-court republication of the libel to individuals, radio and television came after the statements by Pasma.

## 9. CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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STATE REPORTER
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Volume 39

No. 82-50

LARRY WILLIAMS,

Plaintiff and Appellant,

v.

Submitted: Nov. 15, 1982
Decided: Dec. 29, 1982

JAMES PASMA,

Defendant and Respondent.

LIBEL AND SLANDER, Action claiming libel and asking for Damages, Whether it was error to grant summary judgment which held Williams is a Public Figure as a matter of law, Whether there was any genuine issue as to any material fact regarding whether Pasma acted with Malice, Whether the rules protecting Freedom of Speech and Press in libel actions apply to a Nonmedia defendant, Whether the defenses of "belief in the truth" and "fair comment" were properly pleaded. Appealed from the Thirteenth Judicial District Court, Yellowstone County, Hon. William J. Speare, Judge.

For Appellant: Gerald J. Neely, Billings.

For Respondent: Herron, Meloy and Llewellyn, Helena

Mr. Neely argued the case orally for Appellant; Mr. Peter M. Meloy for Respondent.

Opinion by Justice Harrison; Justices Daly, Shea and Weber concurred. Chief Justice Haswell dissented.

Affirmed.

Mr. Justice Harrison delivered the Opinion of the Court.

Plaintiff/appellant, Larry Williams, filed a complaint in the Thirteenth Judicial District, Yellowstone County, against defendant/respondent, James Pasma, claiming libel and asking for damages. On January 8, 1982, the District Court granted summary judgment to Pasma. Williams appeals.

The alleged libel was prompted by an occurrence of events which began in October, 1979. At that time there was "talk" that Superintendent of Public Instruction, Georgia Ruth Rice, would be opposed by a former employee, Judi Fenton. On October 24, 1979, Kenneth Dunham, Secretary

to the State Republican Committee, made a critical comment about both Rice and Fenton which was carried by the Great Falls Tribune. In the same edition of the Tribune there was another story announcing that unsuccessful U.S. Senate candidate Williams and former Governor Tim Babcock had been selected and agreed to head a John Connally for President committee.

When Pasma, a member of the State Democratic Committee, read the two news reports, he found it ironic the republicans were criticizing the two potential democratic candidates while at the same time they announced the appointment of two individuals (Williams and Babcock) who had had "trouble with the law" to run Connally's campaign committee. Pasma then composed a press release which was printed in the Great Falls Tribune on October 27, 1979. Pasma stated, "The entire thrust of my article was for Mr. Dunham to busy himself cleaning up his own house rather than attacking unannounced democratic candidates and delving or messing around in any way in the democratic primary." The press

release stated:

"A Democratic Party official Friday accused state Republican spokesman Ken Dunham of making statements about Democrats that were 'short on content and long on poor taste and bad manners.'

"Democratic national committeeman Jim Pasma, Havre, took issue with comments Dunham made this week about Public Instruction Supt. Georgia Ruth Rice and her possible Democratic opponent, Judi Fenton. Rice also is a Democrat.

"Dunham had questioned Rice's competency and said he was disturbed that Democrats would consider nominating 'another bureaucrat' like Fenton for the job.

"Pasma called Dunham's comments 'typical of the traditional negative chatter that comes from the Republican state office.' He said Dunham's press releases, which included a 'vicious personal attack' on Rice and 'an equally unbecoming media salvo' against Fenton 'may very well set the tone for the type of campaign rhetoric we can expect from the GOP in 1980.'

"Pasma said it was ironic that on the same day that Dunham attacked the Democrats, a story ran indicating that former Republican Gov. Tim Babcock and Larry Williams, unsuccessful 1978 GOP Senate candidate, were among the leaders of a state committee promoting the presidential candidate John Connally.

"When we consider that all three have at one time or another been under federal indictment for political and financial shenanigans, it is small wonder to me at least that Ken Dunham busies himself calling attention to what he considers the shortcomings of possible Democratic opponents, Pasma said.'

"Connally, a former Democratic governor

of Texas, was acquitted of charges that he was bribed by milk producers when he was secretary of the treasury. Babcock pleaded guilty and was fined for making an illegal campaign contribution to former President Richard Nixon. Williams was stripped of his licenses as an investor and commodity adviser, but a court ruled in his favor and his licenses have been returned.

"Pasma urged Dunham to spend his time making sure the Republicans come up with their best qualified candidate for superintendent to insure a healthy debate of the issues in the general election."

Pasma's misconception about Williams evolved from an article which appeared in Forbes Magazine and was reprinted in the Billings Gazette. The article contained the following statement:

"Court records show that williams was three times charged with violations of federal regulations covering commodities and security investment counselors."

Pasma claims he did not know the difference between "charged with a federal offense" and "being under federal indictment."

In a story which appeared in the Great Falls Tribune on October 30, 1979, Williams demanded a retraction from Pasma. Williams stated Pasma's charges that Williams had been under federal indictment were false and constituted "dirty politics" and he would file a libel suit if a

formal retraction was not made. Williams said, "Somebody has to teach political people in Montana to play the game by the facts and by the truth, and if that happens to be me, so be it."

In a telephone interview after Williams demanded a retraction, Pasma stated: "If Mr. Williams says he wasn't indicted, then I have no choice but to believe him unless someone informed me otherwise." This statement was published in the Great Falls Tribune on October 30, 1979. Pasma further admitted that "his use of the words 'federal indictment' in a press release 'apparently was a poor one.'" In an interview published in the Great Falls Tribune on December 11, 1979, Pasma stated, "At the time I made the statement that Mr. Williams had been federally indicted, as had former Governor Babcock and former Governor Connally, I sincerely believed it, . . . talking to Mr. Williams by phone he assured me that this was incorrect and as I said in a previous news release, I believe him."

After Pasma refused to make a formal retraction, Williams filed a complaint in Yellowstone

County against Pasma alleging that he had been libeled and suffered damages by virtue of the article published in the Great Falls Tribune. Pasma moved to dismiss the action claiming Williams was a "public figure" and therefore in order for Williams to recover he must allege and prove actual malice. Before the District Court acted on the motion to dismiss, Williams amended his complaint charging Pasma with actual malice. On January 8, 1982, following cross-motions for summary judgment, the District Court granted Pasma's motion and ordered judgment be entered in favor of Pasma. Williams appeals.

The substance of the issues raised on appeal is as follows:

1. Whether the District Court erred by granting summary judgment which held Williams is a public figure as a matter of law.

2. Whether there is any genuine issue as to any material fact affecting Williams' allegations that Pasma acted with malice, and if not, is there any factual basis upon which a jury could conclude that the statements were made with malice.

3. Whether the state and federal rules protecting freedom of speech and press in libel actions apply to a nonmedia defendant.

4. Whether the defenses of "belief in the truth" and "fair comment" were properly pleaded and if so, whether these defenses and the privileges contained in section 27-1-804, MCA, apply in this action.

Williams contends summary judgment was inappropriate claiming the issue of whether or not he was a public figure is for the jury to determine. Williams cites Article II, Section 7, 1972 Montana Constitution:

"In all suits and prosecutions for libel or slander the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the facts."

In support of his position, Williams relies upon the following language from Madison v. Yunker (1978), 180 Mont. 54, 589 P.2d 126:

"Likewise it may be contended in the retrial that Madison is a 'public figure.' Whatever his status, it is a question for the jury to determine, because of the constitutional provision that the jury under the instructions of the court is the judge of both law and fact. Article II, Section 7, 1972 Montana Constitution. With appropriate instructions, the jury can determine these matters and their status in any trial, unless otherwise stipulated." 589 P.2d at 133.

However, this language is not controlling and must be qualified. In Griffin v. Opinion Publishing Co. (1943), 114 Mont. 502, 138 P.2d 580, this Court correctly stated:

"While our Constitution like that of Missouri, Colorado, South Dakota and Wyoming provides that in libel suits 'the jury, under the direction of the court, shall determine the law and the facts,' yet the decisions clearly show that the function of the court and jury is not greatly different in the trial of libel from what it is in other cases.

"In other words, it is for the court and not the jury to pass upon demurrers to the complaint; upon the admissibility of the evidence; upon motions for nonsuit; upon motions for a directed verdict; upon motions for a new trial and upon motions to set aside verdicts or vacate judgments." 114 Mont. at 512.

Thus, there is no absolute prohibition against granting summary judgment in libel cases. As the United States Supreme Court commented in Roseblatt v. Baer (1966), 383 U.S. 75, 88, 86 S.Ct. 669, 15 L.Ed.2d 597: "we remark only that, as in the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'"

Next, we must decide whether the District

Court was correct in finding Williams was a public figure as a matter of law. If Williams was a public figure at the time of the alleged libel, then he cannot recover damages unless he can show the statement was made with actual malice. This rule was stated by the United States Supreme Court in New York Times v. Sullivan (1964), 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

For a period of time the United States Supreme Court differentiated between public officials and public figures. See Curtis Publishing Co. v. Butts (1967), 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094. Finally in Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323, 351, 94 S.Ct. 2997, 41 L.Ed.2d 789, the United States Supreme Court removed the distinction and classified public figures as falling

into one of two groups:

"In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

In this instance, if Williams falls into either of the above-mentioned groups, it would most likely be the former. Obviously, there is a limited number who can be included in the group of public figures for all purposes. In Gertz the United States Supreme Court stated:

"Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." 418 U.S. at 352.

We must determine here whether there is clear evidence that Williams had "general fame or notoriety in the community" and exhibited "pervasive involvement in the affairs of society."

Prior to the time of the alleged libel Williams had: published an investment advisory service and traded in stocks and commodities;

authored three books on stocks and commodities; been the subject of an article in Forbes Magazine in 1975 and an article in the Wall Street Journal in 1976, and gave a speech to an economic conference in Los Angeles; unsuccessfully ran for the position of United States Senator for the State of Montana in 1978; attended a republican party convention in 1979 and gave a speech; served as chairman for the Montana republican party; and been an active member of the National Taxpayer's Union. Some courts have hinted that national notoriety is necessary to attain general public figure status. See, Swatsler, The Evolution of the Public Figure Doctrine in Defamation Actions, 41 Ohio St. L.J. 1009, 1030 (1980). However, we cannot find any authority from the United States Supreme Court nor State Supreme Court cases that expressly sets such a requirement. In fact, the language "in the community" appears to require only local notoriety. We find the above-mentioned activities do establish clear evidence that Williams had general fame or notoriety in the community (Montana) and ex-

hibited pervasive involvement in the affairs of society and thus was a public figure as a matter of law.

In view of our finding that Williams was a public figure as a matter of law, we must determine whether the District Court erred in holding there is no factual basis upon which a jury could conclude "asma's statements were made with malice. As stated above, the rule that a public official cannot recover damages upon a claim for defamation without a showing of actual malice was stated in New York Times v. Sullivan, supra. There, the United States Supreme Court held malice must be proved by a showing that the statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not."

In New York Times the alleged libel stemmed from a full page advertisement published in the New York Times which spoke of alleged human rights infractions by the police department in Montgomery, Alabama. About whether there was a showing that the publication was made with malice,

the United States Supreme Court stated:

"The statement does not indicate malice at the time of the publication; even if the advertisement was not 'substantially correct' - although respondent's own proofs tend to show that it was - that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it." 376 U.S. at 286.

We find here, as in new York Times, that the statement was made in good faith and although it was not a correct statement, there is simply no evidence the statement was made with actual malice. The difference between the legal words "indicted" or "charged" is relatively minor in the minds of the average Montana citizen and Pasma stated he did not know there was a difference. Pasma's statements to the press which were published after the alleged libel surely abdicate any allegation the statement was made with actual malice: "At the time I made the statement that Mr. Williams had been federally indicted . . . I sincerely believed it, . . . talking to Mr. Williams by phone he assured me that this was incorrect and as I said in a previous news release, I believe him."

Williams next argues the First Amendment

privilege established by New York Times does not apply because Pasma is a nonmedia defendant. The New York Times privilege evolved from the United States Supreme Court's recognition of the need for far-reaching First Amendment protection in certain cases. The United States Supreme Court stated:

> Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen . . . The reason for the official privilege is said to be the threat of damage suits would otherwise 'inhibit the fearless, vigorous, and effective administration of government' and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' [citation omitted] Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer." 376 U.S. at 282.

This privilege was expanded to include matters involving all public figures. The United States Supreme Court did not limit its extension to only media defendants in Gertz, supra. We agree with the holding of the Oregon Supreme Court in Wheeler v. Green (1979), _____ Ore. _____, 593 P.2d 777:

"There is, however, nothing in Gertz which

suggests that the cases applying the New York Times rule to non-media defendants were incorrect or would not be followed in future actions brought by public official or public figures. The Court's concern in those cases to provide adequate protection for freedom of public debate on issues of public importance has not been repudiated. We conclude that all defendants, not only those associated with the media, continue to be protected by the New York Times rule in cases involving comment upon public officials and public figures." 593 P.2d at 784.

This holding is consistent with this Court's ruling in Gallagher v. Johnson (1980), _____ Mont. _____, 611 P.2d 613, 37 St. Rep. 940. In Gallagher we held the New York Times rule applied to a nonmedia defendant who purchased advertising space in a local newspaper to vent his criticisms of, and frustrations with, the government for the City of Anaconda, Montana.

Williams' last assertion is that the defenses of "belief in the truth" and "fair comment" were not properly pleaded and that the statutory privileges contained in section 27-1-804, MCA, are not available in this action. The defenses of "belief in the truth" and "fair comment" were common law privileges which led to the United States Supreme Court's ruling in New York Times v. Sullivan, supra. A close reading of

New York Times reveals that the common law privilege of fair comment was the privilege which the United States Supreme Court was addressing when it stated: "Thus we must consider this case against the background of a profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide open, . . . " 376 U.S. at 270. The common law privilege of belief in the truth was similarly incorporated into the New York Times rule as going to the proof of actual malice. As these privileges were incorporated into the rule set forth in New York Times, there is no longer a requirement that they be pled as specific defenses or lost. Throughout the course of this action, Pasma maintained Williams was a public figure and there was no evidence that the statement was made with actual malice. This is all the defense Pasma was required to plead.

We find no need to comment upon Williams' contention that the privileges contained in section 27-1-804, MCA, are not applicable

here. We have already applied the New York Times rule and its extensions to the facts of this case. In so doing, we find Williams was a public figure at the time of Pasma's statement and there is no evidence that the statement was made with actual malice. Judgment of the District Court is affirmed.

. . . . . .

Mr. Chief Justice Haswell, dissenting:

I would vacate the summary judgment and remand to the District Court for further proceedings.

The lynchpin of the majority opinion is that plaintiff Larry Williams is a public figure for all purposes as a matter of law. I disagree. In my view, this is a jury question precluding summary judgment.

In a libel action the jury, under the direction of the court, determines the law and the facts. Art. II, Sec. 7, 1972 Mont. Const. We have previously held that a person's status as a public figure is a question for the jury to determine. Madison v. Yunker (1978), 180

Mont. 54, 66, 589 P.2d 126, 133. The majority now limit Madison to cases where there is a genuine issue of material fact for the jury to determine. I agree.

My quarrel is with the majority conclusion that there is no jury question in this case. In my view, there is a genuine issue of material fact as to whether plaintiff Larry Williams is a public figure for all purposes which forecloses summary judgment.

The substance of the uncontested evidence of record in this case discloses the following facts relating to Williams' status as a public figure at the time of the alleged libel (October 27, 1979):

(1) Williams was an unsuccessful candidate for United States Senator in 1978 and in connection therewith made numerous speeches, issued press releases, appeared on TV, and made numerous public appearances in connection with his campaign;

(2) Williams authored three books on stocks and commodities prior to 1978;

(3) Williams published an investment advisory service and traded in stock and commodities;

(4) Williams and others were selected to be members of the State Committee for Republican presidential candidate John Connally;

(5) Williams was the subject of an article in Forbes magazine in 1975 and the Wall Street Journal in 1976;

(6) Williams gave a speech to an Economic Conference in Los Angeles;

(7) Williams attended a Republican convention and gave a speech for a candidate for State Republican Chairman;

(8) Williams was a member of the National Taxpapers Union and gave testimony to a legislative committee and worked at the legislative level, made a public statement promoting balanced budgets, and issued three press releases during the legislative session.

Do these uncontested facts make Williams an all-purpose public figure as a matter of law? Not at all. To establish such there must

be "clear evidence of general fame or notoriety in the community, and persuasive involvement in the affairs of society." Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323, 352, 94 S.Ct. 2997, 3013, 41 L.Ed.2d 789, 812. It has been held by a federal appeals court that "a person can be a general public figure only if he is a 'celebrity' - - his name is a 'household word' - - whose ideas and actions the public in fact follows with great interest." Waldbaum v. Fairchild Publications, Inc. (D.C. Cir. 1980), 627 F.2d 1287, 1292, cert. denied, 449 U.S. 898, 101 S.Ct. 266, 62 L.Ed.2d 128. Examples of persons the courts have held to be all-purpose public figures are Johnny Carson [Carson v. Allied News Co. (7th Cir. 1976), 529 F.2d 206] and William F. Buckley, Jr. [Buckley v. Littell (2nd Cir. 1976), 539 F.2d 882, cert. denied, 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 777]. Measured by these standards, isn't there at least a jury question as to whether Larry Williams qualifies as an all-purpose public figure? Is Williams a celebrity whose name is a

household word and whose ideas and actions the public follows with great interest? There is no evidence that the general public is even aware of his many publications and activities. Nor is there evidence of the impact of his activities on the public.

It is equally important to note other facts disclosed by the record:

(1) Williams was not a public official;

(2) Williams did not inject himself into the Pasma-Dunham controversy that gave rise to the alleged libel;

(3) Prior to the alleged libel, Williams had not served as an officer of the Republican Party, was not involved in promoting placement of Initiative 86 on the ballot, and was not involved in any activity in connection with the John Connally campaign.

A party opposing summary judgment is entitled to the benefit of all inferences that may reasonably be drawn from the offered proof. Mally v. Asanovich(1967), 145 Mont. 99, 105,

423 P.2d 294, 297. A case should never be withdrawn from the jury unless it appears, as a matter of law, that a recovery cannot be had upon any view of the facts which the evidence reasonably tends to establish. Miller Insurance Agency v. Home Fire Etc. Ins. Co. (1935), 100 Mont. 551, 561, 51 P.2d 628, 630. Such is not the case here. The summary judgment should be vacated and the case should proceed to jury trial.

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF YELLOWSTONE

| | | |
|---|---|---|
| LARRY WILLIAMS, | ) | Judge William J. Speare |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. DV79-1996 |
| | ) | |
| JAMES PASMA, | ) | ORDER |
| | ) | |
| Defendant. | ) | |

This cause is presently before the court on plaintiff's Amended Complaint, which sets forth three counts of alleged libel and defamation of plaintiff's character by defendant. The three counts all pertain to the same published statement but set forth different theories of liability. County I, in essence, claims libel per se; County II alleges the defendant made the statement negligently and is a negligence theory; Count III sets forth that the statement is made maliciously. To the Amended Complaint defendant has now filed an Answer containing four defenses. The first defense claims that the Complaint does not state

a cause of action; the second defense is a general denial of the entire Complaint, except that the defendant admits that he serves in the capacity as Democratic National Committeeman from the State of Montana and is a resident of Havre; the third defense affirmatively alleges that the plaintiff is a public figure, and any statements about plaintiff were either true or made witout malice; and the fourth defense sets forth affirmatively that the statements by defendant were true and were privileged under §27-1-804, MCA.

The parties have taken depositions, have had requests for admissions, have filed affidavits; and certain interrogatories have been answered. There presently pends before the court plaintiff's Motion to Strike the Affirmative Defenses from Defendant's Answer and Plaintiff's Motion for Partial Summary Judgment. There also pends before the court defendant's renewed Motion for Sanctions and Defendant's Motion for Summary Judgment.

The court has heard argument of counsel

and has considered the memoranda and briefs filed herein and has considered all the files, records and proceedings herein; and good cause appearing therefor,

IT IS ORDERED that plaintiff's Motion to Strike defendant's Answer in certain respects is hereby DENIED; and

IT IS FURTHER ORDERED that plaintiff's Motion for Partial Summary Judgment be, and hereby is, DENIED;

IT IS FURTHER ORDERED that defendant's Motion for Sanctions against plaintiff be, and hereby is, DENIED;

IT IS THE FURTHER ORDER that it has been established herein material facts as to which there is no issue as follows:

1. On October 26, 1979, the defendant published and caused to be published and circulated widely by the Great Falls Tribune newspaper on October 27, 1979, a statement which included mention of the plaintiff;

2. That said statement appeared as follows in the October 27, 1979, issues of the

Great Falls (Montana) Tribune:

"A Democratic Party official Friday accused state Republican spokesman Ken Dunham of making statements about Democrats that were 'short on content and long on poor taste and bad manners.'

Democratic national committeeman Jim Pasma, Havre, took issue with comments Dunham made this week about Public Instruction Supt. Georgia Ruth Rice and her possible Democratic opponent, Judi Fenton. Rice also is a Democrat.

Dunham had questioned Rice's competency and said he was disturbed that Democrats would consider nominating "another bureaucrat" like Fenton for the job. Pasma called Dunham's comments 'typical of the traditional negative chatter that comes from the Republican state office.' He said Dunham's press releases, which included a 'vicious personal attack' on Rice and 'an equally unbecoming media salvo' against Fenton 'may very well set the tone for the type of campaign rhetoric we can expect from the GOP in 1980.'

Pasma said it was ironic that on the same day that Dunham attacked the Democrats, a story ran indicating that former Republican Gov. Tim Babcock and Larry Williams, unsuccessful 1978 GOP Senate candidate, were among the leaders of a state committee promoting the presidential candidate John Connally.

'When we consider that all three have at one time or another been under federal indictment for political and financial shenanigans, it is small wonder to me at least that Ken Dunham busies himself calling attention to what he considers the shortcomings of possible Democratic opponents,' Pasma said."

3. That the defendant is, and at all times mentioned herein was, a Democratic

national committeeman from the State of Montana and a citizen and resident of the City of Havre;

4. The defendant at the time that said statement was made was neither a publisher or broadcaster or employed as such in any publishing or broadcasting media;

5. That the plaintiff at no time had been "under federal indictment for political and financial shenanigans" or, for that matter, under federal indictment at all;

6. On January 30, 1978, the above-named plaintiff, LARRY WILLIAMS, publicly announced his candidacy as a member of the Republican party for the position of United States Senator for the State of Montana;

7. That said plaintiff's said candidacy was maintained continuously from January 30, 1978, until the general election held in November, 1978. That during that period, plaintiff made speeches; appeared on television; placed or authorized placement of advertisements on campaign posters, in newspapers and on television, all of which were for the

purpose of publicly advocating his own candidacy; for the purpose of urging defeat of his opponents for such candidacy; for the purpose of criticizing the public actions and policies of his opponents, particularly Max Baucus; for the purpose of criticizing the fiscal, economic and monetary policies of his opponents and of the Democratic party and urging and advocating a reversal or abandonment of such policies and urging different policies regarding such subjects as taxation and public spending. Such activity occurred during the period of his aforesaid candidacy to, and including, the date of November 10, 1978;

8. That between the dates of November 10, 1978, and October 27, 1979, said plaintiff, Larry Williams, was a member of the National Taxpayers Union. He was publicly known, during that period, as Montana Representative of the National Taxpayers Union and, as such, made public statements relating to the influencing of governmental policy relating to, and

criticizing, governmental budgets, expenditures and economic policies thereof. During that period, he was the coordinator of drives and programs of the National Taxpayers Union within the State of Montana;

9. Prior to October 26, 1979, plaintiff was a member of a political committee in the State of Montana, the purpose of which committee was to raise funds, organize in various counties and to talk to persons urging the political candidacy of one John Connally for Republican nominee as President of the United States. Plaintiff's activity in this regard was publicly known and publicly announced as being state chairman of the "Connally for President Committee" in the State of Montana;

10. In the summer of 1979, plaintiff attended a public Republican convention and there gave a speech favoring the candidacy of one Ben Nordell, who was seeking Republican party office. Mr. Nordell subsequently appointed plaintiff finance chairman for the

Montana Republican party;

11. On or before October 27, 1979, plaintiff as a public figure and Republican party member and candidate and active member of the Montana Taxpayers Union who voluntarily expressed, publicly, views and criticisms of governmental spending policies and controversies contending the same and also as to public controversies relating to political candidacies both within, and outside of, the Republican party. On or before October 27, 1979, defendant knew plaintiff as such a public figure and candidate and an avowed, practicing member of the Republican party;

12. In preparation and forwarding of the press release and statement, subject of the within litigation, and insofar as same relates to plaintiff, defendant was relying on published newspaper accounts which indicated and conveyed to him that what he stated in the said press release was true;

One of the newspaper reports upon which defendant based his said belief appeared in

the Billings Gazette on June 3, 1978, and stated:

> "Court records show that Williams was three times charged with violations of federal regulations covering commodities and security-investment counselors."

Defendant had seen other publicity to the same effect and had no reason to believe that the accounts were not true nor that there was any difference between the terms "charged with violation of federal regulations covering commodities and security-investment counselors" and "federal indictment for political and financial shenanigans". Defendant's purposes in arranging for release of said statement was to inform the public as to what he believed to be shortcomings of certain Republican party members as candidates for public office and as party officials, including plaintiff;

13. Beginning on January 30, 1978, and continuing through October 26, 1979, and beyond, plaintiff was a public figure. He was a candidate for public office who, after such candidacy terminated, continued as a public figure; as a member and officer of

a political party; as a representative of the National Taxpayers Union; as an active member and leader of a political organization promoting the Republican nomination of a candidate for President of the United States; and as a promoter of an initiative to be placed on a public ballot. Plaintiff, during said period, publicly, prominently, actively and as a leader, injected himself into public discussion of public and controversial questions;

14. Plaintiff was a public figure at the time of the release of the statement which is the subject of this litigation;

15. Defendant's making and publishing of the statement as aforesaid was not done with malice or reckless disregard of the truth thereof;

16. There are no other, or any, issues as to any material facts herein, and defendant is entitled to summary judgment as a matter of law.

IT IS THEREFORE ORDERED that defendant's Motion for Summary Judgment be, and the same

hereby is, GRANTED, and that judgment for defendant be entered forthwith as herein provided.

DATED this 1 day of January, 1982.

/s/ William J. Speare
DISTRICT JUDGE

cc: Counsel of record
Gerald J. Neely
Peter M. Meloy

Office-Supreme Court, U.S.
FILED
MAY 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1540

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

---

LARRY WILLIAMS,

Petitioner,

vs.

JAMES PASMA,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

---

# BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION

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No. 82-1640

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

---

LARRY WILLIAMS,

Petitioner,

vs.

JAMES PASMA,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

---

# BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION

---

## QUESTIONS PRESENTED

Whether this Court should grant a Writ of Certiorari when the Petitioner claims that the Montana trial and appellate courts erred:

(1) In determining that the Petitioner was a public figure within the meaning of the First Amendment to the U.S. Constitution, and in applying the constitutional privilege to a statement "unrelated to a public controversy or public affairs,"

(2) In holding there was no factual basis upon which a jury could conclude the alleged libelous statements were made with "actual malice," and

(3) In applying the First Amendment privilege to a "non-media" Defendant.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | 1 |
| TABLE OF CONTENTS | 2 |
| TABLE OF AUTHORITIES | 3-4 |
| OPINIONS BELOW | 5 |
| JURISDICTION | 5 |
| STATEMENT OF CASE | 5 |
| SUMMARY OF ARGUMENT | 10 |
| REASONS FOR DENYING THE WRIT | 13 |
| CONCLUSION | 25 |

## TABLE OF AUTHORITIES


| CASES | PAGE |
|---|---|
| Anderson v. Low Rent Housing Commission, No. 81-714, 50 U.S.L.W. 344 | 24 |
| Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1967) | 17,21 |
| Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) | 12,13,15,16 |
| Gibson v. Maloney, 263 S.2d 632, 636, cert.den., 268 S.2d 909 (Florida 1972), cert.den., 410 U.S. 984 93 S.Ct. 1505, 36 L.Ed.2d 180, (1973) | 21-22 |
| Grad v. Copeland, 280 S.2d 461, 462 (Florida District Court of Appeals), cert.den., 287 S.2d 682 (Florida) | 21 |
| Henry v. Collins, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965) | 21 |
| Hirman v. Rogers, 257 N.W.2d 563, 566 (Minn. 1977) | 22 |
| Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) | 14,20 |
| Jacron Sales Co. Inc. v. Sindorf, 276 Maryland 580, 350 A.2d 688, 696 (1976) | 22 |

| CASES | PAGES |
|---|---|
| Mertz v. Denny, No. 81-2376, 51 U.S.L.W. 3258 | 24 |
| Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971) | 15-16 |
| New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) | 12,17,20, 21,24 |
| St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) | 17,21 |
| Wollman v. Graff, 287 N.W.2d 104, 107 (S.D. 1980) | 22 |
| Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 61 L.Ed.2d 450, 99 S.Ct. 2701 (1979) | 13,14 |

OTHER AUTHORITIES

| | |
|---|---|
| Restatement (Second) of Torts, Section 580 (b) and (e), pages 230 and 231, and Section 592(a), special note pages 259-260 (1977) | 22 |

## OPINIONS BELOW

The opinion of the Montana Supreme Court affirming the trial court's summary judgment is reported at 39 St. Rpt. 2332, 656 P.2d 212, and is attached as an Appendix to the Petition for Certiorari commencing at page A-1. The trial court opinion granting summary judgment is found beginning at page A-24 of the same Appendix.

## JURISDICTION

The decision of the Supreme Court of Montana was entered on December 29, 1982. The jurisdiction of this Court is properly invoked under 28 U.S.C. Section 1257(3).

## STATEMENT OF THE CASE

The factual framework within which this case was resolved by the Montana courts is most concisely stated in the trial court's Findings of Fact

No. 6 through 11, pages A-28 through A-31 of Petitioner's Appendix. In summary, the Montana courts concluded Petitioner was a public figure on the basis that during the twenty months prior to the alleged libel, the Petitioner actively sought the United States Senate seat from Montana, securing the Republican nomination for the position, was an active member of the Republican party, a representative in Montana of the National Taxpayers Union, an active member and leader of a political organization promoting the Republican nomination of John Connally for President of the United States, a promoter of an initiative to be placed on the public ballot and throughout that time prominently, publicly and actively injected himself into general public discussions of political and controversal questions.

During the course of the 1978 Senatorial campaign, a newspaper story reported "court records show that Williams was three times charged with violations of federal regulations covering commodities and security investment counselors." The Defendant had seen this publicity and had no reason to believe the account to be untrue.

In the fall of 1979, state and national candidates from both parties began to actively pursue primary nominations. As a part of that activity, the Republican Party launched a salvo against the potential contenders for the Democratic nomination for Superintendent of Public Instruction, one of the five statewide elected officers in the executive branch of Montana government. In response to this political

attack, Respondent Pasma, an active member of the Democratic Party, issued a press release critizing the Republicans for interfering in Democratic primaries and suggesting that they should, instead, launder their own political organizations. The Respondent cited as an example, the recently announced Connally for President campaign organization in Montana headed by former governor Tim Babcock (who had been indicted for illegal contributions to the Nixon presidential campaign) and Petitioner, Williams, who had been charged with violations of regulations covering commodities and security investment counselors. The Petitioner used the term "indictment" rather than "charged" in his censure of the three Republicans.

The Petitioner brought a libel action claiming that he had never been "indicted,"

was a private individual and no constitutional protections were afforded Respondent as to his claim. After completion of discovery, the Respondent moved for summary judgment claiming that the Petitioner was a "public figure" and there was no evidentiary basis to suggest or conclude that the statements were made with actual malice. The trial court determined there to be no genuine or material issue of fact with respect to Williams' status as a public figure and proceeded to search the record for any evidence of malice. Finding none, the court concluded there was no evidentiary basis upon which the jury could conclude the statements were made with malice and entered judgment on both issues in favor of the Respondent. The Plaintiff appealed, raising issues similar to

those cited in his Petition, here, and the Supreme Court rejected those arguments in affirming summary judgment.

## SUMMARY OF ARGUMENT

It is Respondent's position that the Montana Supreme Court decision is entirely consistent with applicable decisions of this Court and there is no reason for a review on certiorari of the ruling, below.

Utilizing precedent set down by this Court, the Montana Courts concluded that in the several years preceding the alleged libel, the Petitioner voluntarily participated in public and political activities which propelled him to the forefront of his political party. Indeed, these achievements merited his designation as John Connally's campaign chairman in Montana. By virtue of these activities, Petitioner

had significant access to the channels of effective communication and, by his own admission, readily utilized the media in promoting his political beliefs. The Court below correctly denominated the Petitioner a public figure for all purposes.

Even if the Supreme Court had chosen to consider the Petitioner a public figure for the purpose of the controversy into which he had injected himself, to-wit, the Connally for President campaign, such voluntary act ran him the risk of closer public scrutiny. Concomitant with vested political leadership, goes Petitioner's credibility and character. In agreeing to lend his name and influence to the presidential campaign, the Petitioner assumed the risk of closer public scrutiny. Respondent's comment was certainly

part of the entire political controversy involving the credence of John Connally and the people chosen to lead his campaign. It simply cannot be said that the comments giving rise to the alleged libel did not arise out of the public controversy which precipitated the remarks.

Finally, there is no legitimate basis for distinguishing between the standards applicable to media and non-media defendants in public figure libel cases under the freedom of speech. Even if one were to assume that freedom of speech and press are not synonymous, there is no basis in the plain language of the First Amendment that would justify according greater protection to the media than to private individuals. Therefore, the Montana Supreme Court was correct in applying the constitu-

tional standard requiring malice to be established by clear and convincing evidence to this "non-media" defendant.

## REASONS FOR DENYING THE WRIT

### 1. PETITIONER IS A "PUBLIC FIGURE" FOR PURPOSE OF APPLYING THE NEW YORK TIMES MALICE STANDARD

The Montana Supreme Court, below, adopted this Court's ruling in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) that clear and convincing evidence of actual malice be shown when a public official sues a media defendent for libel. Since the Petitioner was not an elected or appointed governmental official, the Montana courts looked to Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) wherein this Court defined two types of "public figures." First, individuals who through fame and notoriety

are public figures for all purposes. Secondly, and more commonly, there are individuals who inject themselves or are drawn into a particular controversy and thereby become public figures for a limited range of issues. "Such persons assume special prominence in the resolution of public questions." Id at 351, 94 S.Ct. at 3013, 41 L.Ed.2d at 812. "In either event, they invite attention and comment." Id at 345, 94 S.Ct. 3009, 41 L.Ed.2d at 808.

In Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 61 L.Ed.2d 450, 99 S.Ct. 2701 (1979), the majority characterized the ruling in Gertz as follows:

> We identify two ways in which a person may become a public figure for purposes of the first amendment:
>
> 'For the most part those who attain this status have assumed rules roles of especial prominence in the affairs of society. Some occupy

> positions of such persuasive power and influence that they are deemed public figures for all purposes.
>
> More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. 418 U.S. at 345, 94 S.Ct. 2997, 41 L.Ed.2d 789.'

Wolston, 443 U.S. at 164, 61 L.Ed.2d at 458

Obviously, frequency of public exposure is a substantial element in the formula by which one assumes a role of "especial prominence in the affairs of society." However, an examination of this Court's rulings in Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411, (1979) and Wolston, supra, reveals an underlying factor upon which a public figure determination ultimately turns. After discussing the media access rationale in Wolston, Mr. Justice Rehnquist articulates:

> Second, and more importantly, was a normative consideration that public figures are less deserving of protection than private persons because public figures like public officials, have "voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them." (Citing Gertz, 418 U.S. at 345)

Hutchinson, 443 U.S. at 164, 61 L.Ed.2d at 458.

Here, unlike Ronald Hutchinson and Ilya Wolston, Larry Williams successfully propelled himself to the forefront of Montana politics moving from a virtual unknown to a political leader in a little less than two years. In doing so, he invited the risk of negative comment about his character and background. He became, in the manner prescribed by Gertz, a public figure for purposes of the First Amendment.

This Court applied the same logic in characterizing a Senatorial candidate as a public figure in Monitor Patriot

Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971).

A subsidiary issue is raised by Petitioner with respect to the "community" referenced in Gertz:

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. 418 U.S. at 352.

The Montana Court construed the word "community" to mean the "Montana community." Respondent agrees with the Montana Court's conclusion that the relevant community is Montana. Certainly, the community is circumscribed by the Petitioner's political involvement and it was in that same arena that the publication of the alleged libel occurred. The distinction drawn by Petitioner is therefore meaningless in the context of this case.

## 2. PETITIONER FAILED TO PRESENT A GENUINE ISSUE OF MALICE

The rule of New York Times v. Sullivan imposes a constitutional protection and prohibition against recovery by public officials or public figures for defamatory falsehood unless it can be established with convincing clarity that the statement was made with actual malice, that is "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. The touchstone of malice in this specialized sense is knowledge. The libel defendant must either have published with a "high degree of awareness of probable falsity" [Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1967)] or "in fact entertained serious doubts as to the truth of his publication" [St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323,

20 L.Ed.2d 262 (1968)].

The Respondent argued below that unless the evidence adduced during discovery demonstrates that Plaintiff had some evidentiary basis for an actual malice determination by clear and convincing proof, summary judgment for Respondent must be granted under Montana law. This assertion was raised at the outset of the suit and was urged throughout discovery. At no time did Petitioner provide any evidence that Respondent had actual knowledge or entertained any serious doubts as to the accuracy of the news report of Petitioner's difficulties with the Securities and Exchange Commission. Nevertheless, Petitioner argues that summary disposition of the malice issue is inappropriate because it involves Respondent's subjective feelings and

those feelings must suffer the scrutiny of a jury.

Respondent here submits that a plaintiff is not entitled to continue litigation in the mere hope of putting Respondent's credibility at issue without producing some evidence establishing that the Respondent might in fact have entertained serious doubts concerning the truth of his statements. There must be some presentation of objective facts on which awareness or knowledge could be premised.

To the date of his Petition, Petitioner has yet to identify any factual basis which would support a verdict that Respondent knew or had a high degree of awareness that Larry Williams had not been "indicted" by the federal government. Indeed, it was not until this lawsuit was commenced that

Respondent was made aware of the legal distinction between "indictment" and "charged." The Montana courts simply refused to hold Respondent retroactively liable for his failure as a lay person to make this distinction.

### 3. THERE IS NO CONSTITUTIONAL BASIS FOR DISTINGUISHING AND NOT APPLYING NEW YORK TIMES IN LIBEL CASES INVOLVING NON-MEDIA DEFENDANTS

Respondent here acknowledges the author of the majority opinion in Hutchinson v. Proxmire, supra, observed that this Court has never decided whether New York Times applies to non-media defendants. (443 U.S. 111, 133, N. 16, 99 S.Ct. 2675, 2687, N. 16, 16 L.Ed.2d 411).

Petitioner's characterization of this footnote is that the Court "has reserved the question of whether the First Amendment restrictions apply to non-media defendants." (Petition,

page 19.) Certainly, an acknowledgement that the question has not been decided does not constitute a "reservation" of the issue.

Although this Court has not directly confronted the issue, it has on several occasions applied the New York Times rule in cases involving non-media defendants. See Garrison v. Louisiana, supra, Henry v. Collins, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965) and St. Amant v. Thompson, supra.

In any event, state courts have confront the issue and had little difficulty applying New York Times without differentiating between media and non-media defendants. See Grad v. Copeland, 280 S.2d 461, 462 (Florida District Court of Appeals), cert.den., 287 S.2d 682 (Florida); Gibson v. Maloney, 263 S.2d 632, 636, cert.den., 268 S.2d 909

(Florida 1972), cert.den., 410 U.S. 984, 93 S.Ct. 1505, 36 L.Ed.2d 180, (1973); Hirman v. Rogers, 257 N.W.2d 563, 566 (Minn. 1977); Wollman v. Graff, 287 N.W.2d 104, 107 (S.D. 1980).

As the Supreme Court of Maryland noted in Jacron Sales Co. Inc., v. Sindorf, 276 Maryland 580, 350 A.2d 688, 696 (1976) the common law of defamation, apart from the relatively recent injection of constitutional considerations is renowned for its complexity. If the courts apply the same rules of defamation to media and non-media defendants, the complexity can be decreased and the courts can move toward consistency and simplicity in the law of defamation.

The Restatement (Second) of Torts, Section 580 (b) and (e), pages 230 and 231, and Section 592(a), special note, pages 259-260 (1977), has "codified"

the general resolution of this issue by the lower courts:

> . . . the protection of the first amendment extends to freedom of speech as well as to freedom of the press, and the interest that must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

Finally, it is clear that this Court is uniquely disinterested in resolving the issue, insofar as it routinely denies certiorari in cases presenting the identical issue here. Indeed, in this most recent term of the Court, certiorari has been

denied in Mertz v. Denny, No. 81-2376, 51 U.S.L.W. 3258 and Anderson v. Low Rent Housing Commission, No. 81-714, 50 U.S.L.W. 344. In Mertz, the Court was asked by a defendant to review a Wisconsin Supreme Court ruling that New York Times does not apply to a non-media defendant. In Anderson, the Court was asked to review an Iowa Supreme Court ruling that New York Times does apply to a non-media defendant. This Court denied certiorari in each of those cases. Certainly, this case does not present a dissimiliar policy issue and Respondent submits that it should be resolved similarily.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition

for Writ of Certiorari should be denied.

Respectfully submitted,

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